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Narrowing a Federal Rule to Reserve an Erie Situation: Rule 50 and State No-Waiver Laws

Austin Stephenson

NARROWING A FEDERAL RULE TO RESOLVE AN *ERIE* SITUATION: RULE 50 AND STATE NO-WAIVER LAWS

INTRODUCTION

Concerned about punitive damage awards gone awry, the California Supreme Court created a rule: the reviewability of punitive damages would not be subject to waiver, even in the face of a defendant's procedural error at trial.[1] The court linked its rule to a strong public interest to ensure that punitive damage awards would always be appropriate and not "the product of passion or prejudice."[2] In the case of *Freund v. Nycomed Amersham*, this California law would have shielded the defendant company from punitive damages in excess of one million dollars.[3] But there was a procedural catch. The suit was brought in federal court in a diversity action,[4] and the U.S. Court of Appeals for the Ninth Circuit decided that a federal waiver precept trumped the state law and prevented Nycomed from appealing the issue.[5]

The Ninth and Third Circuits have both tackled this conflict between state no-waiver rules[6] and federal waiver precepts stemming from Federal Rule of Civil Procedure 50. Both circuits had to delve into the *Erie* doctrine, first established in *Erie Railroad v. Tompkins*, in order to reach their conclusions.[7] The courts came up with two very different approaches and created a circuit split in the process.[8] Unfortunately, neither circuit's application of *Erie* principles shed

1. *See* Adams v. Murakami, 813 P.2d 1348, 1350, 1354 n.5 (Cal. 1991); *see also* Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (noting that under California law "the appealability of punitive damage awards is not waivable").

2. *Adams*, 813 P.2d at 1350.

3. *Freund*, 347 F.3d at 756.

4. Diversity jurisdiction is a type of federal jurisdiction that allows a federal court to hear a case "involving parties who are citizens of different states [with] an amount in controversy greater than a statutory minimum." BLACK'S LAW DICTIONARY 929 (Deluxe 9th ed. 2009).

5. *See Freund*, 347 F.3d at 762.

6. The Ninth Circuit used the term "no-waiver rule" to refer to the state law in *Freund*, and this Comment adopts that terminology for all similar state laws. *Id.* at 761–62.

7. *Compare Freund*, 347 F.3d at 761 (finding that Rule 50 requirements trumped a state law), *with* Simmons v. City of Philadelphia, 947 F.2d 1042, 1086 (3d Cir. 1991) (holding that a state law trumped Rule 50 requirements in a very similar situation).

8. *See Freund*, 347 F.3d at 762 n.9 (noting the split). Professor Martin Redish has also noted this split. *See Martin H. Redish, Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling*, *in* 9 MOORE'S FEDERAL PRACTICE § 50.43[3][f] (3d ed. 2006) (discussing state law's effect on Rule 50).

much light on the conflict, and both approaches failed to provide a consistent and accurate framework for resolving future, similar conflicts. In *Freund*, the Ninth Circuit applied the Rules Enabling Act and held that federal waiver under Rule 50 should trump the state no-waiver law.[9] The Third Circuit came to the opposite conclusion in *Simmons v. City of Philadelphia* when it upheld a state law ensuring municipal immunity against federal waiver, but its *Erie* analysis did not properly justify its holding.[10] The question remains unresolved: what is the correct *Erie* framework that courts should apply when confronted with these types of conflicts, and will federal waiver under Rule 50 always override state no-waiver rules?

Entering into the disagreement between the circuits on this issue might seem like wandering into a minefield given the infamous vagaries of the *Erie* doctrine[11] and the relatively opaque reasoning behind the Third and Ninth Circuit opinions. But this Comment offers a straightforward solution: if Rule 50 is narrowly construed,[12] then it becomes clear that there is no direct collision between state no-waiver laws and the Federal Rule itself. Because there is no direct collision, the conflict that exists is between a federal judge-made rule and state law, which calls for the more straightforward outcome-determinative *Erie* analysis and will not implicate the Rules Enabling Act.[13]

Once courts have chosen the correct *Erie* framework, they should recognize that state no-waiver laws are substantive for *Erie* purposes and uphold them in the face of federal waiver requirements. Part II examines the history of the relevant federal law and Supreme Court doctrine and summarizes the decisions that formed the basis of the

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9. *Freund*, 347 F.3d at 761.

10. *See Simmons*, 947 F.2d at 1086.

11. *See, e.g.*, Michael A. Berch & Rebecca White Berch, *An Essay Regarding* Gasperini v. Center for the Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 MISS. L.J. 715 (1999). The authors write,

> As every first-year law student soon discovers, the landmark case of [*Erie*] broke ranks with a long and uniform line of cases formulating rules of general federal common law for deciding cases brought in the federal courts solely on the basis of diversity. . . . In this area of the law, confusion reigns and the pendulum swings widely from the presumptive application of state law to a presumption in favor of the application of federal law.

Id. at 715–16.

12. This approach was suggested by the dissent in *Freund*, although the dissent did not elaborate fully on how a narrow construction of the Rule could be accomplished. *See Freund*, 347 F.3d at 769 (Gould, J., dissenting in part).

13. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980) ("Since there is no direct conflict between the Federal Rule and the state law, the [Enabling Act] analysis does not apply. Instead, the policies behind *Erie* . . . control [the conflict].").

circuit split in detail.[14] Part III rejects an application of the Rules Enabling Act to the conflicts at issue, advancing a narrow construction to prove that there is no inherent direct collision between the state laws and Rule 50.[15] Part III also applies the correct *Erie* framework, which was not applied by either circuit addressing the issue, and finds that the choice between state and federal law is outcome-determinative in the *Erie/Hanna* sense and that state no-waiver laws can survive in the face of countervailing federal interests.[16] Finally, Part IV considers some broader implications of this *Erie* framework and suggests that the principles advanced here will be easily applicable in practice.[17]

II. BACKGROUND

Rule 50 waiver conflicts take place against a much larger backdrop of dense legal doctrine. To understand how the conflicts should be treated, it is useful to understand how the Supreme Court has tackled similar *Erie* issues, as well as what approach the Third and Ninth Circuits each took in their attempts to resolve the conflict. Section A first explains the function of Federal Rule 50 and how that Rule is interpreted by the courts, foreshadowing its potential to create trouble with state law.[18] Section B summarizes the major developments of the Supreme Court's *Erie* doctrine, as that doctrine is essential to understanding how to deal with conflicts between state and federal law.[19] Finally, Section C examines the current circuit split over how to apply the *Erie* doctrine in the face of a specific type of conflict between Rule 50 waiver and state law.[20]

A. The Meaning and Purpose of Federal Rule 50

Rule 50 is a powerful Federal Rule that can take the case out of the hands of the jury, allowing the judge to direct a verdict for either party during or after trial.[21] The Rule dictates, in relevant part, how and when a party may move for judgment as a matter of law.[22] The Rule

14. *See infra* notes 18–118 and accompanying text.
15. *See infra* notes 119–65 and accompanying text.
16. *See infra* notes 166–220 and accompanying text.
17. *See infra* notes 221–25 and accompanying text.
18. *See infra* notes 21–30 and accompanying text.
19. *See infra* notes 31–79 and accompanying text.
20. *See infra* notes 80–118 and accompanying text.
21. FED. R. CIV. P. 50; *see also* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 (3d ed. 2008) (describing the scope and purpose of Rule 50).
22. FED. R. CIV. P. 50. The full text of the relevant portion of Rule 50 reads as follows:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

contains two distinct procedures that allow two separate but related motions. A Rule 50(a) motion allows a party to move for judgment as a matter of law during trial.[23] A Rule 50(b) motion, also a motion for judgment as a matter of law, may only be made after the jury has rendered its verdict and the trial has come to a close.[24] Although the Rule does not mention waiver on its face, the Advisory Committee Notes to the Rules state that the 50(b) motion "can be granted only on grounds advanced in the pre-verdict [50(a)] motion," as it is simply a renewal of that original 50(a) motion.[25]

The upshot of the dual motions is that the moving party gets a second and final chance with its 50(b) motion to request judgment as a matter of law once all the evidence has been presented, all arguments have been made, and the jury has rendered its verdict. It is crucial, however, that the second motion mirror the first and contain no new grounds for judgment, as suggested by the Advisory Committee Notes.[26] Courts will deny a 50(b) motion at the close of trial if it contains legal arguments not mentioned in the 50(a) motion—any "new" arguments are effectively waived, and this requirement is typically viewed by those courts as part and parcel of the Federal Rule itself.[27]

There is a strong argument behind prohibiting a moving party from raising a new issue in its 50(b) motion. That argument is usually made with reference to the two primary rationales behind waiver: (1) to

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(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Id.

23. FED. R. CIV. P. 50(a)(2). This type of motion was formerly known as a motion for a directed verdict. *See* FED. R. CIV. P. 50 (Advisory Committee's Note to the 1991 Amendment) (discussing the old terminology and noting that "[i]f a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.").

24. FED. R. CIV. P. 50(b). A Rule 50(b) motion was formerly known as, and is sometimes still referred to as, a motion for judgment notwithstanding the verdict, or J.N.O.V.

25. *Id.* (Advisory Committee's Note to the 1991 Amendment); *see also* Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (explaining how the procedure works in practice).

26. FED. R. CIV. P. 50(b) (Advisory Committee's Note to the 1991 Amendment).

27. *See, e.g.*, Ford v. Cnty. of Grand Traverse, 535 F.3d 483, 491–92 (6th Cir. 2008); Marshall v. Columbia Lea Reg'l Hosp., 474 F.3d 733, 738–39 (10th Cir. 2007); Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098, 1105–06 (Fed. Cir. 2003); *Freund*, 347 F.3d at 761; McCardle v. Haddad, 131 F.3d 43, 50–51 (2d Cir. 1997); Simmons v. City of Philadelphia, 947 F.2d 1042, 1085 (3d Cir. 1991). Although a 50(a) motion may now be properly brought at any time during the trial prior to the verdict, in the past, courts would often deny 50(b) motions because a moving party had failed to bring its 50(a) motion at "the literal close of all the evidence." *See* Steven Alan Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After* Unitherm *and Amended Rule 50*, 26 REV. LITIG. 239, 255–57 (2007).

"preserve[ ] the sufficiency of the evidence as a question of law, allowing the district court to review its initial denial of judgment as a matter of law instead of forcing it to 'engage in an impermissible reexamination of facts found by the jury;'" and (2) to "call[ ] to the court's and the parties' attention any alleged deficiencies in the evidence at a time when the opposing party still has an opportunity to correct them."[28] While the second rationale represents a fairness concern, the first rational is constitutional: the Seventh Amendment's Reexamination Clause states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States."[29]

Rule 50 is not set by design on an inevitable crash course with state laws in every instance. In most diversity cases, the Rule will function without much complication and with no need to invoke the Supreme Court's *Erie* doctrine. The Rule leads to *Erie* problems when a party makes a procedural error under the Rule and waives a legal argument that, according to state law, it cannot legally waive. The circuit split described later will show exactly how these conflicts unfold.[30]

B. A Brief History of the Relevant Erie *Doctrine*

An examination of the conflict between state law and Rule 50 necessarily takes place against the backdrop of *Erie Railroad v. Tompkins*. The courts that created the circuit split at issue here undertook relatively short and simple *Erie* analyses. However, because the doctrine as a whole is dense, it warrants a brief summary.[31]

1. Historical Erie*: the Baseline Doctrine*

Before the Supreme Court decided *Erie*, federal courts sitting in diversity ignored most state substantive law and were "free to exercise their own independent judgment."[32] *Erie* changed this, holding that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of

28. *Freund*, 347 F.3d at 761 (quoting Lifshitz v. Walter Drake & Sons, 806 F.2d 1426, 1428–29 (9th Cir. 1986)); *see also* WRIGHT & MILLER, *supra* note 21, § 2537.

29. U.S. CONST. amend. VII.

30. *See infra* notes 80–118 and accompanying text.

31. The Supreme Court recently decided an important *Erie* case that is not directly relevant to this Comment's analysis. *See generally* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010). For a short discussion of *Shady Grove* and its relevance to the wider *Erie* discussion, see *infra* note 136.

32. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 530 (1928); *see also* Swift v. Tyson, 41 U.S. 16 Pet. 1, 18–19 (1842); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 622–24 (1999) (describing various instances prior to *Erie* in which federal courts ignored state law and applied "general constitutional law").

the State."[33] The Court's language signaled a strong shift wherein federal courts would have to pay greater deference to the autonomy of states.[34]

Erie was quickly followed by another case that expanded this deference. In *Guaranty Trust Co. v. York*, the state statute of limitations would have barred the plaintiffs from bringing their suit in state court, so they brought their case in federal court in a diversity action.[35] But the Supreme Court held that the state statute of limitations controlled, barring the plaintiff's action.[36] In doing so, the Court created an "outcome-determinative" test to determine which law—state or federal—would control in such situations: "[T]he intent of [*Erie*] was to insure that . . . the outcome of the litigation in diversity cases in the federal court should be substantially the same . . . as it would be if tried in a State court."[37] The outcome-determinative test seriously strengthened state law at the expense of federal procedural law in diversity actions. Because most rules—even purely procedural ones—can affect the outcome of a case, *York* threatened to defeat any hope of a uniform system of rules in the federal courts.

The Court's decision in *Hanna v. Plumer* was a reaction to the practical difficulties of the *York* test.[38] *Hanna* involved a clash between Federal Rule of Civil Procedure 4(d) and a state service-of-process rule.[39] Invoking the outcome-determinative test established in *York*, the defendant argued that because the choice between state and federal rules would affect the outcome of the case, that state rule must apply.[40] The Court conceded that the rule at issue was indeed outcome determinative, but in doing so, it noted that *York*'s outcome-determinative test "was never intended to serve as a talisman."[41] The Court modified the *York* test to curb the deference that outcome determination had given to state law. After *Hanna*, outcome determina-

33. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

34. *Id.* at 79 (quoting Baltimore & Ohio R.R. v. Baugh, 149 U.S. 363, 401 (1893) (Field, J., dissenting), which stated, "Supervision over either the legislative or the judicial action of the States is in no case permissible . . . [unless] specifically authorized or delegated [by the Constitution] to the United States. Any interference with either . . . is an invasion of the authority of the State, and . . . a denial of its independence.").

35. Guaranty Trust Co. v. York, 326 U.S. 99, 100–01 (1945).

36. *See id.* at 112.

37. *Id.* at 109.

38. For a more in-depth review of *Erie* developments from *Erie Railroad* through *Hanna*, see Donald L. Doernberg, *The Unseen Track of* Erie Railroad*: Why History and Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611, 621–38 (2007).

39. Hanna v. Plumer, 380 U.S. 460, 461 (1965).

40. *Id.* at 466.

41. *Id.* at 466–67.

tion must be read to consider the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[42] The *York* test was therefore changed to better accommodate the Federal Rules, with the stated goal of preserving uniformity of procedure in federal courts.[43]

But *Hanna* did more than modify *York*'s outcome-determinative test. It also delineated a second category of "special"[44] cases in which a state law directly conflicts with a Federal Rule of Civil Procedure instead of conflicting with a federal judge-made rule.[45] In such cases, *Hanna* called for a departure from typical *Erie* considerations and outcome determination, holding that the Rules Enabling Act controls the dispute.[46] In the case of a direct conflict between a Federal Rule and a state law, the Federal Rule will control under the terms of the Enabling Act as long as that Rule is procedural in nature.[47] The importance of the state law bumping up against the Federal Rule becomes irrelevant, with one small caveat: the Federal Rule may still run afoul of the Enabling Act if it "abridge[s], enlarge[s] or modif[ies] any substantive right."[48] Notably, Rule 4 did not abridge any substantive right in *Hanna*, and so the Rule trumped the state law.[49]

2. *Modern* Erie*: Two Categories of Cases Involving the Federal Rules*

The Court's approach to modern *Erie* conflicts that involve the Federal Rules can be split into two rough categories. The first category

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42. *Id.* at 468. In a footnote, the Court elaborated on its modification of outcome determination:

> [W]hen a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

Id. at 468 n.9.

43. *See id.* at 468. For a more in-depth summary of *Hanna*'s holding and its importance to wider *Erie* doctrine, see John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 286–95 (2008).

44. The word "special" is used by the *Freund* court to differentiate a Rules Enabling Act case from the standard *Erie* conflict: "A special case arises when the federal law [in conflict with state law] is embodied in a Federal Rule of Civil Procedure." Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003).

45. *See Hanna*, 380 U.S. at 469–70.

46. *See id.* at 470–71.

47. *Id.* at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

48. *Id.* (quoting the Rules Enabling Act, 28 U.S.C. § 2072 (2006)).

49. *Id.* at 473–74.

involves cases of "direct collisions" between the Federal Rules and state law.[50] These direct collisions are controlled by the Rules Enabling Act, the statute in which Congress authorized the Supreme Court to establish a uniform set of procedural rules for the federal courts.[51] The second, less uniform category involves cases in which a Federal Rule lurks somewhere in the background, but it "is [not] sufficiently broad to control the issue before the Court" and preclude the application of the state law.[52] If there is no direct collision between the Federal Rule and state law, the case calls for the standard *Erie/ Hanna* outcome-determinative analysis rather than the Enabling Act analysis.[53] Two post-*Hanna* cases demonstrate how the Court treats each category, and taken together, these cases form the modern foundation required to understand how courts should treat conflicts between Rule 50 and state law.[54]

The first case, *Burlington Northern Railroad v. Woods*, represents a direct collision between a Federal Rule and a state law and is one of the few cases that the Court decided entirely under the Rules Enabling Act.[55] *Burlington* involved a state statute imposing a mandatory penalty on parties that lost their appeals.[56] Federal Rule of Appellate Procedure 38 also provided sanctions for frivolous appeals, but allowed the judge to exercise her discretion in awarding damages, rather than imposing a mandatory penalty.[57] The Supreme Court held that the Federal Rule must override the state law.[58] The Court explained that under *Hanna*'s interpretation of the Rules Enabling Act, "Rules which incidentally affect litigants' substantive rights do not violate [the Enabling Act] if reasonably necessary to maintain the integrity of that system of rules."[59] The Court also indicated that the two rules were sufficiently related to one another to cause a direct conflict and suggest that the Federal Rule was meant to control the field.[60]

The final *Erie* case, *Gasperini v. Center for Humanities*, involved a Federal Rule that the Court held did not actually collide at all with

50. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 4–5 (1987). Despite its wider implications for *Erie* doctrine and its modification of *York*'s outcome-determinative test, *Hanna* itself also falls into this category. *See Hanna*, 380 U.S. at 470.

51. *Burlington*, 480 U.S. at 5 (citing 28 U.S.C. § 2072).

52. Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) (citing *Hanna*, 380 U.S. at 470).

53. *See id.* at 752–53.

54. *See infra* notes 55–79 and accompanying text.

55. *Burlington*, 480 U.S. at 5, 7–8.

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.* at 8.

59. *Id.* at 5 (citing Hanna v. Plumer, 380 U.S. 460, 464–65 (1965)).

60. *Id.* at 7.

state law.[61] In *Gasperini*, the plaintiff journalist had taken thousands of slide transparencies of overseas conflicts and agreed to let the defendant Center for Humanities borrow them for educational purposes.[62] The Center lost the slides and the journalist brought suit in a diversity action.[63] A jury awarded the journalist $450,000 in compensatory damages, which the Center contested as excessive in its Rule 59 motion for a new trial.[64] The federal district court rejected the motion without explanation.[65] On appeal, the Second Circuit set aside the damage award as excessive, applying New York's state standard of review to find that the award "materially deviate[d] from what is reasonable compensation."[66]

The *Erie* issue in *Gasperini* involved the conflict between the state's "deviates materially" standard and a different federal standard that would have set aside the damage award as excessive only if it "shocked the conscience."[67] Federal Rule 59, which provides for a new trial "for any reason for which a new trial has heretofore been granted . . . in federal court,"[68] arguably required the application of the federal standard.[69] The Court rejected the notion that the Federal Rule directly conflicted with the state standard, asserting that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[70] The Court instead treated the federal standard of review as a federal judge-made rule, and as a result, applied the standard *Hanna*-modified outcome-determinative test.[71] In doing so, the Court found a way to accommodate the New York state standard, holding that "[j]ust as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so

61. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) (rejecting a Rules Enabling Act analysis because "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies"); *see also* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 993–96 (1998) (describing *Gasperini*'s "conflict determination" analysis).

62. *Gasperini*, 518 U.S. at 419.

63. *Id.*

64. *Id.* at 420.

65. *Id.*

66. *Id.* at 421 (quoting Gasperini v. Ctr. for Humanties, Inc., 66 F.3d 427, 431 (2d Cir. 1995)).

67. *Id.* at 422, 426.

68. FED R. CIV. P. 59(a).

69. *See Gasperini*, 518 U.S. at 432–33.

70. *Id.* at 427 n.7.

71. *See id.* at 428–30.

Erie precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."[72]

The Court's *Erie* analysis in *Gasperini* then took a sharp turn when it balanced state and federal interests, arguably reviving an old *Erie* precedent long thought dead.[73] Having found the Federal Rule to be outcome determinative in the *Hanna* sense, the Court proceeded to identify a "countervailing federal interest[ ]" that weighed against outright application of the state standard.[74] The Court approvingly cited the old precedent, *Byrd v. Blue Ridge*, and noted that the "'outcome-determination' test was an insufficient guide in cases presenting countervailing federal interests."[75] The Court found that it could accommodate both sets of interests, and so it preserved the state standard of review in the face of a Seventh Amendment challenge in its balancing analysis.[76]

In his dissent, Justice Antonin Scalia disagreed with the majority's *Erie* analysis, noting that it was largely superfluous because Rule 59 directly collided with a state standard.[77] Due to the direct conflict between a Federal Rule and state law, Justice Scalia argued, the proper *Erie* analysis must include a discussion of the Rules Enabling Act.[78] Although he did not expound at length upon what this analysis would look like, he did state that the Federal Rule should control. Quoting *Hanna*, he wrote that "the court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's 'power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.'"[79]

C. *The Circuit Split*

Over time, a split between the Third and Ninth Circuits emerged over how to deal with conflicts between state laws and Rule 50 waiver precepts. Specifically, in both cases the question involved a state no-

72. *Id.* at 430–31 (alterations in original) (quoting Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949)).

73. See Rowe, *supra* note 61, at 1002–13, for an extensive argument that *Gasperini* revived *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), although limitedly.

74. *Gasperini*, 518 U.S. at 432.

75. *Id.* (citing *Byrd*, 356 U.S. at 537).

76. *Id.* at 436–37.

77. *Id.* at 467–68 (Scalia, J., dissenting).

78. *See id.*

79. *Id.* at 468 (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

waiver law bumping up against an improperly raised Rule 50(b) motion.[80]

1. Simmons v. City of Philadelphia

The Third Circuit first confronted the issue directly in the 1991 case of *Simmons v. City of Philadelphia*.[81] In that case, the plaintiff was arrested for public intoxication and killed himself in his jail cell.[82] His mother, as administrator of his estate, brought both federal and state law claims against the City of Philadelphia and several other parties.[83]

The case came before the circuit court with a relatively complicated procedural history,[84] but the most relevant portion of the record for this discussion concerns the denial of the City's Rule 50(b) motion.[85] At trial, the City made a Rule 50(a) motion; the motion did not mention that as a municipality, the City was immune from liability under Pennsylvania state law.[86] The City raised this defense for the first time in its Rule 50(b) motion after the court returned a verdict in Simmons's favor.[87] The district court rejected the motion, finding that the City had waived this defense by failing to raise it prior to the close of trial.[88] The state law at issue, however, also provided that the defense of municipal immunity was an "absolute defense" that could not be waived.[89]

The Third Circuit viewed the conflict as a direct collision between a state law forbidding waiver of a particular defense and a Federal Rule dictating that the same defense be waived.[90] It held, however, that Pennsylvania's no-waiver law controlled and that the district court erred in denying the City's 50(b) motion for judgment as a matter of law.[91] Despite categorizing the conflict as a direct collision between a state law and a Federal Rule, the court never once mentioned the

80. *Compare* Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (finding that Rule 50 requirements trumped a state law), *with* Simmons v. City of Philadelphia, 947 F.2d 1042, 1086 (3d Cir. 1991) (holding that a state law trumped Rule 50 requirements in a very similar situation).

81. *Simmons*, 947 F.2d at 1042.

82. *Id.* at 1049–50.

83. *Id.* at 1050.

84. *Id.* at 1053–55.

85. *Id.* at 1084–85.

86. *See id.* at 1054–55.

87. *Id.* at 1085.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1086.

Rules Enabling Act.[92] Instead, the court used an outcome-determination analysis to justify its holding.[93] Citing *Hanna v. Plumer*, the court held that the choice between federal and state law must be made with "reference to the principles of outcome determination and the deterrence of forum shopping that underlie *Erie*."[94]

Based on these principles from *Erie* and *Hanna*, the court determined that "the small probability that a municipal defendant would fail to raise the [state law] defense of immunity" was not likely to influence a plaintiff's choice between state or federal court.[95] The court did find, however, that the state law was likely to heavily influence the outcome on appeal and each party's chances of prevailing.[96] It concluded that the Pennsylvania state law was therefore "substantive" for *Erie* purposes and prevailed over Rule 50.[97]

2. Freund v. Nycomed Amersham

The Ninth Circuit reached a different result years later in *Freund v. Nycomed Amersham*. In that case, the defendant company, Nycomed, fired the plaintiff Freund for "disruptive behavior."[98] Freund sued his former employer for wrongful termination in a federal diversity action and sought punitive damages.[99] In response, Nycomed moved for judgment as a matter of law under Rule 50(a), alleging only that "Freund's complaints did not implicate any public policy that could give rise to a wrongful termination claim" under state law.[100] The district court disagreed, denying the motion, and the jury subsequently awarded Freund $1,150,000 in punitive damages.[101] Nycomed responded to the verdict with a Rule 50(b) motion, renewing its former argument but also arguing—for the first time—that "the punitive damages award should be overturned because Freund did not prove that [the defendant] acted with malicious intent in terminating

92. *See id.* at 1085. Before outlining its *Erie* analysis, the court stated, "It is well established that, although state law governs the decision of substantive issues in federal diversity actions . . . the Federal Rules of Civil Procedure control the resolution of procedural issues." *Id.*

93. *Id.* at 1085–86.

94. *Id.* at 1085 (citing Hanna v. Plumer, 380 U.S. 460, 467 (1965)).

95. *Id.* at 1085–86.

96. *Id.* at 1086.

97. *Id.* Despite this small victory for the City, the court ultimately found that, for separate reasons unrelated to procedure, the City's argument for municipal immunity lacked merit. *Id.* at 1086–88. *Simmons* also contained a concurrence and dissent, neither of which addressed the issues discussed here. *See id.* at 1089–92 (Sloviter, C.J., concurring), 1092–98 (Weis, J., dissenting).

98. Freund v. Nycomed Amersham, 347 F.3d 752, 757 (9th Cir. 2003).

99. *Id.* at 757 & n.4.

100. *Id.* at 757.

101. *Id.*

him."[102] The district court agreed with this new argument and overturned the punitive damage award while upholding the rest of the verdict.[103]

On appeal, Freund argued that the district court had mistakenly granted the 50(b) motion because Nycomed had not properly raised the insufficient evidence of malice defense in its prior 50(a) motion.[104] The Ninth Circuit agreed.[105] As such, the Ninth Circuit panel had to confront a troublesome wrinkle: "[U]nder California law the appealability of punitive damage awards is not waivable."[106] Before reversing the lower court and reinstating the punitive damage award, the court first had to deal with an apparent conflict between California state law and the Federal Rules of Civil Procedure.[107]

When a federal law is enshrined in the Federal Rules of Civil Procedure, the court explained, the Federal Rule will apply as long as it does not "abridge, enlarge or modify any substantive right" and so run afoul of the Rules Enabling Act.[108] Because it viewed the federal waiver principle as part and parcel of Rule 50, causing a direct collision between state law and a Federal Rule, the court held that Rule 50 trumped the California law.[109] The court reasoned that the state law only controlled "when and how [punitive damages] can be reviewed," which is a purely procedural as opposed to a substantive concern.[110]

The court also acknowledged its disagreement with the Third Circuit's decision in *Simmons* briefly, attempting to distinguish it in a footnote: "*Simmons* held that a state rule against waiver of governmental immunity was substantive because it could affect the outcome on appeal . . . [t]he fact that a procedural rule may affect the outcome of an appeal does not make the rule substantive; most procedural rules may affect outcome."[111] The court admitted that the California law was "rooted in [the] public policy" of the state, but it reasoned that the law still could not be substantive because the policy behind it was not adequately related to *Erie* concerns.[112] Although it held that the Rules Enabling Act controlled the case, the court strangely fell

102. *Id.*
103. *Id.* at 757–58.
104. *Id.* at 760.
105. *Id.*
106. *Id.* at 761.
107. *Id.*
108. *Id.* (quoting the Rules Enabling Act, 28 U.S.C. § 2072 (2006)); *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965).
109. *See Freund*, 347 F.3d at 761–62.
110. *Id.* at 762.
111. *Id.* at 762 n.9 (citation omitted).
112. *Id.* at 762.

back on *Hanna*-modified outcome determination to support its conclusion that the state law lacked substance.[113]

The dissent in *Freund* strongly protested the outcome of the court's *Erie* analysis.[114] In the dissent's view, the majority had "expand[ed] the scope of a federal court's power in a diversity action beyond permissible bounds, produce[d] a result . . . contrary to both [the state law in question] and the Due Process Clause of the Fourteenth Amendment, and create[d] a circuit split in the process."[115] The dissent further argued that, although there was a direct conflict between state law and a Federal Rule, the California law was a substantive one under the meaning of the Supreme Court's *Erie* doctrine.[116] Although the dissent admitted that no Federal Rules have been invalidated because they ran afoul of the Rules Enabling Act, it argued that federal rules "[have] been narrowed by federal courts to avoid abridging substantive rights."[117] Rule 50, it argued, should be narrowed in order to limit it to its "intended procedural scope."[118]

III. CHOOSING AND APPLYING THE CORRECT *ERIE* FRAMEWORK

The Third and Ninth Circuits applied different *Erie* frameworks to analyze the conflicts they confronted in *Simmons* and *Freund*, respectively. Although the Third Circuit in *Simmons* seemed to assume a direct collision, it nevertheless applied *Hanna*'s modified outcome-determinative test as if it faced only a conflict between a federal judge-made rule and state law.[119] *Freund*, on the other hand, explicitly held that Rule 50 directly collided with state law and applied the Rules Enabling Act accordingly to find that the Federal Rule controlled.[120] Section A analyzes the Ninth Circuit's framework in *Freund* and finds that, if the framework is correct, it leaves little room for operation of any state no-waiver law.[121] Although it is theoretically possible, even under a Rules Enabling Act analysis, to save substantive state law from a contrary Federal Rule, the task is a difficult one under current Supreme Court doctrine. It would necessarily involve wading into a

113. *See id.* (citing *Hanna*, 380 U.S. at 468 n.9).

114. *Id.* at 767 (Gould, J., dissenting in part).

115. *Id.* Judge Gould's separate, constitutional argument, relying on a series of cases in which courts have viewed certain punitive damage awards as too excessive under the Due Process Clause, is not examined here.

116. *Id.* at 769.

117. *Id.*

118. *Id.*

119. *See supra* notes 81–97 and accompanying text.

120. *See supra* notes 98–118 and accompanying text.

121. *See infra* notes 125–40 and accompanying text.

larger and intractable debate over how scholars interpret "substance" and "procedure" under the terms of the Enabling Act. Rejecting the Rules Enabling Act analysis, Section B examines the approach suggested by the dissent in *Freund*: reading Rule 50 narrowly to avoid a direct conflict with state law.[122] Finding the dissent's analysis deficient, Section C then articulates a more comprehensive, narrow reading of Rule 50, arguing that there is no direct conflict between the plain meaning of Rule 50 and state law.[123] Because there is no direct conflict, the Rules Enabling Act does not apply. Section D then applies the corresponding *Erie* analysis to the conflicts in *Simmons* and *Freund*.[124]

A. *The Ninth Circuit's Approach: Applying the Rules Enabling Act to Resolve the Conflict*

At first glance, the Ninth Circuit's approach in *Freund* to the conflict seems appropriate. Assuming a direct collision between a Federal Rule and state law, the Rules Enabling Act will control.[125] Then, as the court put it, "the federal rule must be applied if it does not 'abridge, enlarge or modify any substantive right.'"[126] Even if the Ninth Circuit was correct about the direct collision, the problem with the court's analysis is that it fails to adequately defend its ultimate conclusion: that the state law is merely procedural and so is trumped by Rule 50.

The Supreme Court has yet to specifically define what rights are "substantive" under the meaning of the Rules Enabling Act.[127] All

122. *See infra* notes 141–50 and accompanying text.

123. *See infra* notes 151–65 and accompanying text.

124. *See infra* notes 166–220 and accompanying text.

125. This aspect of *Hanna* was confirmed by *Gasperini* when the Court wrote, "Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) (citing Hanna v. Plumer, 380 U.S. 460, 469–74 (1965); Burlington R.R. v. Woods, 480 U.S. 1, 4–5 (1987)).

126. Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (quoting the Rules Enabling Act, 28 U.S.C. § 2072).

127. *See* Rowe, *supra* note 61, at 977–78. After explaining the substance–procedure dichotomy in the Rules Enabling Act and the Court's limited treatment of the subject, Rowe argues,

> [T]his leaves the question whether and if so under what circumstances the Supreme Court or the lower federal courts might or should find a Federal Rule promulgated under its REA authority to have the kind of substantive effect the REA appears to forbid. The Court has repeatedly nodded in its *Erie-Hanna* cases toward the "abridge, enlarge or modify" language while adhering to its strong presumption of the validity of the Federal Rules, emphasizing that merely incidental effects are not proscribed and upholding every challenged Federal Rule it has found to conflict with state law.

Id. (footnotes omitted).

that *Hanna* and its progeny made clear is that an analysis of substance and procedure under the Enabling Act must differ somehow from the modified outcome-determinative analysis.[128] The Ninth Circuit therefore erred when, in an effort to characterize the state law as merely procedural, it argued that "[the] importance of [the] rule to [the] State is relevant only to determine whether refusal to apply [the] rule would encourage forum-shopping or unfairly discriminate against [the] State's citizens."[129] This is simply a reversion to the modified outcome-determination analysis, and the court should not have relied on it given its chosen Enabling Act framework.

Even if the Ninth Circuit had given more weight to the Enabling Act's substance–procedure dichotomy and properly differentiated it from a standard *Erie* analysis, it is likely that the Enabling Act would still dictate that the Federal Rule controls. As *Hanna* pointed out and commentators have repeatedly emphasized, no Federal Rule has ever been invalidated because it violated the "abridge, enlarge or modify"[130] clause of the Enabling Act.[131] Indeed, where a direct collision with a Federal Rule is present, the Supreme Court has set a high bar for when a state law may, if ever, trump the Federal Rule under the Enabling Act. After *Burlington Northern*, even if a Federal Rule abridges a substantive right, it will still control if it abridges the state right only "incidentally."[132]

A defender of state no-waiver laws from an Enabling Act perspective therefore faces three daunting tasks: (1) she must come up with a workable definition for substance under the Enabling Act with little guidance from the Supreme Court; (2) she must show that the state no-waiver rule fits within that definition of substance; and (3) she must settle on a defensible interpretation of *Burlington Northern* and argue that the Federal Rule's interference with the substantive state rule is more than just incidental. All three tasks must be accomplished before the Federal Rule will run afoul of the Enabling Act and be displaced by state law.[133] It is possible to make this argument, and

128. *Hanna*, 380 U.S. at 471 ("It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions.").

129. *Freund*, 347 F.3d at 762 (citing *Hanna*, 380 U.S. at 468 n.9).

130. 28 U.S.C. § 2072.

131. *Hanna*, 380 U.S. at 470; *see also Freund*, 347 F.3d at 769 (Gould, J., dissenting in part); Rowe, *supra* note 61, at 979 (stating that the question of a Federal Rule possibly running afoul of the Enabling Act is "a rarity in the real world and of limited practical significance").

132. Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987).

133. Again, it is important to emphasize that this has never actually occurred. *See supra* note 131 and accompanying text.

some commentators have claimed that the "abridge, enlarge or modify" clause does have the "teeth" capable of protecting state law.[134] But to argue from this perspective is an uphill battle,[135] and it is a battle into which the Supreme Court has proven reluctant to enter.[136]

For someone attempting to defend state interests against Rule 50 under the Rules Enabling Act, there are also more practical difficulties. The body of federal rules is quite large, and they are all promulgated under the authority (and ostensibly within the parameters) of the Enabling Act.[137] Adopting and then advancing a particular definition of substance under the Enabling Act would therefore carry implications for the entire system of Federal Rules.[138] In other words, defending the state laws from an Enabling Act standpoint might require a sea change in the existing law and how it affects the various

134. *See, e.g.*, Rowe, *supra* note 61, at 975–83 (discussing the theoretical potential of the Enabling Act to safeguard the substance of state law).

135. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 92–93 (2008) (describing the high bar set by the incidental-effects test and also arguing that *Burlington* gave the Federal Rules a "gloss of presumptive—indeed, all but irrebuttable—validity").

136. *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 286–87 ("Inasmuch as the Supreme Court has not applied [the 'abridge, enlarge or modify' clause of the Enabling Act] to affect the outcome of a single case in the fifty years of its operative history, the sentence might be considered excess verbiage." (footnote omitted)). *Gasperini*'s eagerness to sidestep a direct collision and to "interpret[ ] the Federal Rules . . . with sensitivity to important state interests and regulatory policies," provides an additional and relatively recent signal that the Enabling Act continues to be irrelevant to the Court's *Erie* jurisprudence. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996).

The Supreme Court did confront the Enabling Act in a very recent *Erie* case, *Shady Grove Orthopedic v. Allstate*. That case splintered the Court, but a slim majority ultimately found a direct collision between the Federal Rule of Civil Procedure at issue, Rule 23, and a New York state law governing class actions. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441–42 (2010). In an opinion authored by Justice Scalia, the five-Justice majority refused Allstate's suggestion that it "*interpret* Rule 23 in a manner that avoids overstepping [the Enabling Act]." *Id.* at 1441. Rule 23 was too broad to allow such an interpretation, and so the Court refused to "contort its text, even to avert a collision with state law that might render it invalid." *Id.* at 1442. Although Justice Stevens joined that part of Justice Scalia's opinion, he refused to join another part of the opinion containing sweeping language as to the Enabling Act's domain and its ability to displace state law. *Id.* at 1448–55 (Stevens, J., concurring in part). Justice Stevens argued that Justice Scalia's opinion ignored the "abridge, enlarge or modify" clause of the Rules Enabling Act. *See id.* at 1452–53. The Enabling Act, Stevens explained, is capable of displacing state laws that "abridge, enlarge or modify" some substantive state rules—just not the state rule at issue in *Shady Grove*. *Id.* at 1459–60. Although this case might signal something interesting about the future of the *Erie* doctrine and the Enabling Act, *Shady Grove* does not feature in this Comment's analysis given that a majority of the Court found an unavoidable collision between the Federal Rule and the state law. Rule 50 and state no-waiver laws, as this Comment argues, present a situation in which such a collision can and should be avoided.

137. *See Burlington*, 480 U.S. at 6.

138. There are, for example, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure, among others.

Federal Rules. This in turn could seriously jeopardize *Hanna*'s goal of maintaining procedural uniformity in the federal courts,[139] particularly if the definition of substance adopted was short-sighted and tailored only with no-waiver laws in mind. To make the Enabling Act argument is to enter broad and at times abstract territory,[140] and so this argument is not the ideal vehicle for addressing a relatively narrow and concrete concern: no-waiver laws conflicting with Rule 50. Fortunately, it is also not the only vehicle available.

B. The Freund *Dissent's Approach: "Narrowing" the Rule to Avoid a Direct Collision*

In his *Freund* dissent, Judge Gould essentially advocated for conflict avoidance in order to preserve California's no-waiver law. He argued that "[a]lthough . . . no Federal Rule of Civil Procedure has been wholly invalidated because of the Enabling Act . . . rules including Rule 50 [in *Simmons*] have been narrowed by federal courts to avoid abridging substantive rights."[141] Although the dissent argued that a direct collision could be avoided, it never adequately explained what a narrow construction of Rule 50 would look like or how that might be accomplished. In fact, the dissent adopted two seemingly contradictory positions: it agreed with the majority that "federal waiver precepts under the literal terms of Rule 50 conflict with California law,"[142] but it also argued that "if Rule 50 is to be limited . . . it must be narrowed."[143] Thus, the dissent failed to explain how, if there is a literal conflict, it is possible to "narrow" the meaning of Rule 50 at all.

The *Freund* dissent also suggested that the Third Circuit successfully narrowed Rule 50 in *Simmons* in order to accommodate the Pennsylvania no-waiver law.[144] While this may be true, the Third Circuit nevertheless failed to provide a convincing, well-reasoned *Erie/Hanna* analysis: the court seemingly found a direct collision between state law and Rule 50, but then ignored the Rules Enabling Act com-

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139. *See* Hanna v. Plumer, 380 U.S. 460, 472–73 (1965).

140. For more in-depth discussions of the Rules Enabling Act, including attempts to determine its definitions of substance and procedure, see generally Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012; Carrington, *supra* note 136, at 281; Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998); Redish & Murashko, *supra* note 135, at 26.

141. Freund v. Nycomed Amersham, 347 F.3d 752, 769 (9th Cir. 2003) (Gould, J., dissenting in part).

142. *Id.* at 767.

143. *Id.* at 767, 769.

144. *Id.* at 767.

pletely.[145] The court proceeded to analyze the conflict under the standard *Erie* outcome-determinative framework without explaining how it had avoided a direct collision between the Federal Rule and state law.[146] This approach fails to produce a guiding doctrinal framework. The court simply concluded that the *Erie/Hanna* outcome-determination test applied without ever explaining why, and it used this argument to conclude that the state law controlled.[147] Such an analysis provides no reliable roadmap to lower courts and disrupts uniformity of procedure in federal courts without providing a rational explanation for doing so.

The final and perhaps most difficult part of the dissent's approach in *Freund* is that, after expressing a desire to narrow Rule 50, it still insisted on a Rules Enabling Act analysis.[148] Applying the Rules Enabling Act suggests that the Rule was not narrowed at all, because the Enabling Act applies only to direct collisions between Federal Rules and state law.[149] For the reasons previously discussed,[150] the application of the Enabling Act is fraught with its own unique difficulties, and a conflicting state law is not likely to survive a rigorous Enabling Act analysis. While the dissent may have had the right idea generally in attempting to narrow the Rule, its implementation of that idea was problematic and left too many questions unanswered.

C. *Articulating a Workable and Narrow Construction of Rule 50*

In order to successfully argue that there is no direct collision between Rule 50 and state no-waiver laws, Rule 50 waiver precepts must be viewed in context. The waiver precepts are contained in the Advisory Committee Notes to the Federal Rules of Civil Procedure, a fact that was not emphasized in *Simmons* or *Freund*.[151] The actual text of the Federal Rules of Civil Procedure is promulgated by the Supreme Court and then sent to Congress for enactment.[152] The Advisory Committee Notes are a different matter; they are somewhat analo-

145. *See* Simmons v. City of Philadelphia, 947 F.2d 1042, 1085–86 (3d Cir. 1991). Although it is a post-*Burlington* decision, the Third Circuit's opinion never references the Rules Enabling Act.

146. *See id.*

147. *See id.*

148. *Freund*, 347 F.3d at 770 (Gould, J., dissenting in part) (arguing that "application of Rule 50 would transgress the authority granted by Congress under the Rules Enabling Act").

149. *See supra* notes 44–49 and accompanying text.

150. *See supra* notes 125–40 and accompanying text.

151. *See supra* note 25 and accompanying text.

152. *See* STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES AND OTHER MATERIALS, at xi (2008).

gous to the committee reports published by legislative committees,[153] and so they do not carry the same binding authority of the final Rules as enacted by Congress.[154]

One might argue that Rule 50 itself is ambiguous on the issue of waiver: it does describe a 50(b) motion as a "renewed" 50(a) motion.[155] But nowhere in the actual text is waiver explicitly required when a party attempts to raise a new argument in the 50(b) motion.[156] In the case of an ambiguous rule or statute, even an ardent textualist might consult an outside source such as the Advisory Committee Notes to aid in interpretation.[157] Indeed, courts are not and should not be free to interpret a Federal Rule in a way that completely contradicts the Rule's plain meaning. The Supreme Court suggested as much in *Walker v. Armco Steel Corp.* when it wrote, "[T]he Federal Rules of Civil Procedure [should not] be *narrowly construed* in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then [the Rules Enabling Act applies]."[158]

The most important point for this discussion is that the text of Rule 50 itself does not explicitly require waiver. Guided by the Advisory Committee, courts read a waiver provision into the Rule in order to easily enforce it. As such, waiver under Rule 50 represents a federal judge-made rule that courts employ in order to make the Rule work.[159] In the event of an ambiguous Federal Rule like this one, courts should be free to adopt a narrow construction out of respect for other constitutional norms—here, federalism—as long as that construction does not run contrary to the text of the Rule itself. Construing Rule 50 to include waiver only as an ancillary mechanism suggested by the non-binding Advisory Committee Notes does nothing to contradict the text of the Rule.

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153. *Id.* at xiii; *see also* EXECUTIVE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JURISDICTION OF THE COMMITTEES 16 (2009), *available at* http://www.uscourts.gov/judconf/09_Sep_Juris_Statements_Final.pdf.

154. *See* YEAZELL, *supra* note 152, at xiii (comparing the Advisory Committee Notes to legislative history).

155. FED. R. CIV. P. 50(b).

156. *See* FED. R. CIV. P. 50(a)–(b).

157. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) (noting that at least some textualists "include[ ] legislative history in the hierarchy" of the tools they use to interpret legislation).

158. Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) (emphasis added).

159. The term "judge-made rule" is used to describe what was previously thought of as federal common law. *See* Rowe, *supra* note 61, at 984–85 (explaining the terminology in this area and giving examples).

A skeptic might argue that this construction of Rule 50 runs afoul of Supreme Court precedent, because the Court in *Walker* warned against narrowing a Federal Rule to avoid a direct conflict. But the Court is somewhat conflicted in its own decisions on this point. For example, sixteen years after *Walker*, the Court arguably narrowed a Federal Rule in *Gasperini* and stated that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[160] Given this nod toward federalism in *Gasperini*, the construction of Rule 50 advanced here seems all the more appropriate.

Finally, finding no collision between the literal terms of Rule 50 and state law obviates the need for a Rules Enabling Act analysis.[161] This is perhaps the greatest advantage of the approach advocated here. Once waiver is no longer imposed by the text of Rule 50 itself, the question in *Burlington* and the question posed by the *Freund* majority—does Rule 50 "abridge, enlarge or modify a substantive right" under the terms of the Enabling Act[162]—becomes irrelevant. The issue of waiver, however, remains. The interpretation of Rule 50 advanced here only disconnects waiver from the literal terms of Rule 50; it does not make waiver disappear from the equation.

Drawing such a fine line between the text of the Advisory Committee Notes and the text of the Rule might seem like overly categorical nitpicking. However, being careful about the distinction in this context is crucial, because the Supreme Court has indicated that it will treat judge-made rules conflicting with state law much differently from laws passed by Congress pursuant to the Rules Enabling Act.[163] Given the Court's dual treatment of *Erie/Hanna* cases and the drastically different consequences for state laws under each type of treatment, reading provisions into the Rules that are not actually in the text represents a dangerous kind of judicial lawmaking. As this Comment has shown, if the provision is part of the Rule itself, the conflicting state law will always collapse under the Enabling Act analysis.

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160. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); *see also* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 262–63 (2008) (noting the same apparent contradiction between the Court's decision in *Walker* and its decision in *Gasperini* regarding the Federal Rules).

161. *See Walker*, 446 U.S. at 752 ("Since there is no direct conflict between the Federal Rule and the state law, the [Enabling Act] analysis does not apply. Instead, the policies behind *Erie* . . . control the [conflict].").

162. Rules Enabling Act, 28 U.S.C. § 2072 (2006).

163. *See supra* notes 50–79 and accompanying text.

The waiver requirement associated with Rule 50 is thus best understood as a federal judge-made rule that courts employ in order to make the Rule work. It is a requirement not contained in the plain meaning of the Rule that courts nevertheless use to give the Rule "teeth." As such, the legal authority for federal waiver is found in case law and not in Rule 50 or the Rules Enabling Act; the jurisdictions that have adopted the waiver suggestion of the Advisory Committee have simply created a judicial practice to help regulate procedure in their courts.[164] The two primary rationales for the waiver requirement remain: (1) it prevents one party from "sandbagging" the other side by raising a new argument at the close of the trial; and (2) it prevents judicial reexamination of facts found by the jury as forbidden by the Seventh Amendment's Reexamination Clause.[165]

D. Applying the Correct Erie *Framework to the Present Conflict*

Once waiver is understood as a federal judge-made rule, the "standard" *Erie* analysis, as opposed to the Enabling Act analysis, applies.[166] However, the application of standard *Erie* principles presents its own unique set of questions in light of the Supreme Court's *Gasperini* decision and its revival of an old balancing test.[167] Subsection one applies *Hanna*'s outcome-determinative test and finds that the state no-waiver laws are substantive for *Erie* purposes.[168] Subsection two acknowledges that the federal law might still control if the countervailing federal interest involved outweighs the state interest.[169] That subsection then performs a *Byrd*-style balancing test with reference to the two specific no-waiver rules at issue in *Freund* and *Simmons* and argues that at least one of those no-waiver provisions should control.[170]

1. Modified Outcome Determination

The starting point for resolving the conflict between Rule 50 and state no-waiver laws is *Hanna*'s modified outcome-determinative

164. For the case authority on this point and examples of jurisdictions adopting the waiver rule, see *supra* note 27 and accompanying text.

165. *See supra* note 28 and accompanying text.

166. Rowe, *supra* note 61, at 985 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988)).

167. *See supra* notes 73–76 and accompanying text.

168. *See infra* notes 171–87 and accompanying text.

169. *See infra* notes 188–97 and accompanying text.

170. *See infra* notes 198–220 and accompanying text.

test.[171] Under *Erie*, courts apply state substantive law and federal procedural law, and the state law is substantive if the choice would affect the outcome of the case.[172] But after *Hanna*, outcome determination must "be read with[ ] reference to the twin aims of the *Erie rule*": the state law is outcome determinative (and substantive for *Erie* purposes) only if a failure to apply it would encourage forum shopping or create an inequitable administration of the laws.[173]

The choices between state and federal law in *Simmons* and *Freund* are outcome determinative in the most straightforward sense: complete waiver of an argument is a harsh penalty and will often dictate the outcome of the case and its disposition on appeal.[174] But will failure to apply the state no-waiver rules encourage forum shopping or create an inequitable administration of the laws? *Hanna* suggests that forum shopping might be encouraged if a party is more likely to choose federal court over state court in order to avoid application of the state no-waiver law.[175] The meaning of "inequitable administration of the law" is less clear, but this concern might exist if the law "unfairly discriminate[s] against citizens of the forum State."[176]

While *Gasperini* held that the choice between state and federal law in that case definitely implicated "the twin aims of the *Erie* rule" under *Hanna*,[177] it is difficult to know whether the Court believed that the conflict implicated forum shopping or the inequitable administration of the law. It was enough for the Court that, given the choice between the state and federal standards, "'"substantial" variations between state and federal [money judgments]' may be expected."[178] It is unlikely that this concern implicated forum shopping. As one commentator observed, "Because the issue will only come to light if the case goes to trial, results in a verdict for the plaintiff, which verdict deviates materially from what is recovered in other cases, yet does not

171. *See* Rowe, *supra* note 61, at 998 ("*Hanna*'s 'twin aims' formulation remains the general and dominant starting point for *Erie* cases involving judge-made federal law.").

172. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

173. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

174. In *Freund*, a lack of evidence of malice would have defeated any claim the plaintiff had to punitive damages. 347 F.3d 752, 761 (9th Cir. 2003). In *Simmons*, the governmental immunity defense would have allowed the city of Philadelphia to completely escape liability (had it not been trumped by a city ordinance reinstating that liability). 947 F.2d 1042, 1043 (3d Cir. 1991).

175. *See Hanna*, 380 U.S. at 468 n.9.

176. *Id.*; *see also* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (finding an inequitable administration of the law where a diversity action would have otherwise been barred by the state statute of limitations).

177. *Gasperini*, 518 U.S. at 428.

178. *Id.* at 430 (alteration in original) (citing *Hanna*, 380 U.S. at 467–68).

shock the conscience, [an incentive to forum shop] seems unlikely."[179] The Court analyzed the situation ex post and found that "a recovery in federal court significantly larger than the recovery [possible] in state court," even in one instance, was sufficient to implicate the twin aims of *Erie*.[180] Even if Rule 50 waiver precepts will seldom bump up against state no-waiver laws, this should not be a deciding factor in the twin aims analysis if *Gaserpini* is to have any relevance at all.

The Ninth and Third Circuits both determined that displacing the state no-waiver laws with a federal waiver requirement in diversity actions would *not* implicate forum shopping concerns.[181] The Ninth Circuit compared California's no-waiver law to a state standard of review, suggesting that, although a standard of review may be rooted in the state's public policy, it is not substantive in the *Hanna* sense.[182] This is a weak argument to make after *Gasperini*, a case that directly implicated a state standard of review for compensatory damages and upheld it, at least in part, under a *Hanna*-modified outcome-determinative analysis.[183] The Third Circuit's *Erie* analysis on this point is more persuasive: concerns over forum shopping would not be implicated "based on the small probability that a municipal defendant would fail to raise the defense of immunity under the [state code] in its Rule 50(a) and 50(b) motions, thereby waiving [the argument]."[184] Put differently, few parties are likely to remove to federal court in the far-flung hope that the opposing party makes such a specific procedural error under Rule 50, thereby waiving a crucial legal argument.

Even if the failure to apply a state no-waiver law does not implicate forum shopping, it might still implicate the inequitable administration of the law. *Hanna* suggests that inequitable administration of the law might be encouraged if application of the federal law "unfairly discriminates against citizens of the forum State."[185] The federal waiver precepts behind Rule 50 are particularly harsh because they call for complete waiver of a particular legal argument that would otherwise be available to citizens of the forum state. For example, assume that the Third Circuit had decided in *Simmons* that the City of Philadel-

179. Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1655–56 (1998).

180. *Gasperini*, 518 U.S. at 431; *see also* Freer, *supra* note 179, at 1654–56 (describing in detail the *Gasperini* Court's ex post twin aims analysis).

181. Freund v. Nycomed Amersham, 347 F.3d 752, 762 n.9 (9th Cir. 2003); Simmons v. City of Philadelphia, 947 F.2d 1042, 1085–86 (3d Cir. 1991).

182. *Freund*, 347 F.3d at 762.

183. *See Gasperini*, 518 U.S. at 427–30.

184. *Simmons*, 947 F.2d at 1086.

185. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965).

phia waived municipal immunity under federal law. If the defense of immunity was otherwise valid,[186] the inequity of forcing waiver in a diversity action is striking; the defense is one that would have immunized the City against the plaintiff's negligence claims and necessitated a wholly different outcome in state court. This is in contrast to a federal standard of review, for example, that might dictate a different outcome on appeal, but does not necessarily have to do so. Application of federal waiver, therefore, unfairly discriminates against a citizen of a state when the state has attempted—through legislation or through its supreme court—to preserve an argument *absolutely and notwithstanding any procedural error.* Here, the respective forum states—Pennsylvania and California—sought to do just that through their no-waiver laws.[187]

Rule 50 waiver conflicts with state no-waiver laws are therefore outcome determinative in the *Hanna* sense and substantive for *Erie* purposes. Although it seems that Rule 50 conflicts will not occur often enough to figure prominently into either party's litigation strategy, *Gasperini* suggests that even one instance of unfairness to the citizen of the forum state, if adequately harsh, is enough to implicate the twin aims of *Erie.* But outcome determination only begins the *Erie* analysis for Rule 50 conflicts.

2. *Balancing the Federal and State Interests*

That the choice between state and federal law is outcome determinative in the *Hanna* sense is a necessary but not sufficient condition for the application of the state rule. Once the no-waiver law survives under outcome-determination analysis, federal law may still control if the countervailing federal interests outweigh the relevant state interests.[188] Although there is much disagreement about the degree to which *Gasperini* really revived the balancing principles first set forth in *Byrd,*[189] there is no doubt that the *Gasperini* Court invoked *Byrd* in order to protect a federal appellate standard of review, "'[a]n essen-

186. In this case, it was not. A city ordinance trumped the state code and reinstated liability that would otherwise have been waived; the court admitted that the question was a close one. *Simmons,* 947 F.2d at 1086–88.

187. *See infra* notes 198–210 and accompanying text (discussing the nature of the state laws in greater detail).

188. *See Gasperini,* 518 U.S. at 432 (noting that in *Byrd,* "the Court said that the *Guaranty Trust* 'outcome-determination' test was an insufficient guide in cases presenting countervailing federal interests").

189. *See generally* C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267 (1997); Freer, *supra* note 179, at 1637; Rowe, *supra* note 61, at 963.

tial characteristic of [the federal court] system."[190] Some have argued that *Gasperini* left unclear what sort of countervailing federal interest is needed to trigger the *Byrd* balancing approach.[191] While this is true, it may safely be assumed that the stronger the federal interest, the more likely the need for the *Byrd* balancing approach.

Despite the fact that the federal waiver requirement is not in the text of Rule 50, it still furthers the same significant federal interests suggested in the Advisory Committee Notes and the case law: (1) it prevents one party from "sandbagging" the other with a new argument at the close of trial, and (2) just like the federal standard in *Gasperini*, waiver here may implicate the Seventh Amendment's Reexamination Clause.[192] Because one of these concerns is constitutional, *Byrd* seems at least as relevant here as it was in *Gasperini*. Therefore, the federal interests must be examined and weighed against the goals of the state no-waiver laws.

After *Gasperini*, a separate question arises regarding how the *Byrd* balancing approach should even work in practice.[193] Because *Byrd* sat unutilized for so long, there is little guidance from lower courts on this matter.[194] *Gasperini* arguably did little to shed light on *Byrd* because, although it invoked the case to protect a Seventh Amendment interest, it did not discuss at length the importance of the state law at issue; *Gasperini* thus treated the law as "substantive" in some sense, but it did little to explain why.[195] *Byrd* at least made one point clear: even if a state law is not "bound up with the definition of the rights and obligations of the parties," it may still be substantive for *Erie* purposes as a rule of "form and mode."[196] First, however, rules of form and mode must be balanced against the countervailing federal interest at stake.[197]

Whether or not the state no-waiver rules in *Simmons* and *Freund* are "bound up with the definition of the rights and obligations of the

190. *Gasperini*, 518 U.S. at 431 (alterations in original) (quoting Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958)).

191. *See, e.g.*, Rowe, *supra* note 61, at 1007.

192. *See supra* note 28 and accompanying text.

193. *See* Rowe, *supra* note 61, at 1007 (describing the Court's use of *Byrd* in *Gasperini* "as a *deus ex machina*, with virtually no explanation of the occasions for or limits on its use, [which] may be understandable as a matter of strongly case-focused judicial method").

194. *Id.* at 986 (describing the way in which the Court had seemingly abandoned *Byrd*).

195. *See* Floyd, *supra* note 189, at 290 ("The fundamental difficulty with *Gasperini* is that . . . the Court applied *Byrd*'s 'balancing' approach to displace the [state rule] without ever addressing the sense in which the . . . state rule should be regarded as a 'substantive' rule.").

196. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958).

197. *See id.* at 536–38.

parties" in the *Byrd* sense,[198] they were certainly designed with substance in mind. A quick look at their underlying rationales demonstrates this point. The state law in *Simmons* prevented waiver of the defense of municipal immunity.[199] The Supreme Court of Pennsylvania created the no-waiver rule: "[A] governmental agency cannot be put at the mercy of negligent or agreed waiver by counsel of a substantive right designed to protect its very existence."[200] The court elaborated that "[s]uch negligence can spread, pebble in a pond, until the governmental agency would be engulfed in a tidal wave of liability."[201] Moreover, the state court was not writing on a blank slate. Years prior, it had "obviated sovereign immunity as a common law defense and the legislature promptly restored it" through § 8542 of the Pennsylvania state code.[202]

The Pennsylvania Supreme Court's mention of substance is automatically indicative of some greater right, but the mention of that word alone is not necessarily determinative. A legislature or state court may declare any right substantive in a conclusory fashion, but without something more, accepting it as such would tilt the balance too easily in favor of the state rule and against the countervailing federal interest in every instance. The underlying rationale of the Pennsylvania state law, though, suggests a right granted for a nonprocedural purpose. The court and the state legislature were concerned about the "very existence" of municipal government, not in providing some procedural mechanism that would make the litigation process fairer. Municipal and state governments, the court decided, cannot be subject to liability for the good of their own tax-paying citizens. The fact that the Pennsylvania code delimits several exceptions to the immunity defense does not weaken the substance of the right.[203] If anything, it strengthens the argument for substance—the law is as specific as possible as to the types of situations in which immunity will apply.

198. *Id.* at 536.

199. Simmons v. City of Philadelphia, 947 F.2d 1042, 1085 (3d Cir. 1991).

200. *In re* The Upset Sale of Props. Against Which Delinquent 1981 Taxes Were Returned to the Tax Claim Unit on or About the First Monday of May, 1982 (Skibo Property), 560 A.2d 1388, 1389 (Pa. 1989).

201. *Id.*

202. *Id.*

203. The legislature carved out a number of exceptions to municipal immunity in the same statute. Some of these areas of exception include negligence involving vehicles; the care, custody, or control of personal property; real property (for instance, streets and sidewalks); trees, traffic controls, and street lighting; utility service facilities; and the care, custody, or control of animals (including police dogs). 42 PA. CONS. STAT. § 8542(b) (2007).

The rationale behind the California law also suggests that it conveys a substantive right of great importance to the state's citizens. The Ninth Circuit even admitted that the "rule has its roots in the State's public policy."[204] Indeed, the California Supreme Court's decision that created the rule is rife with references to public policy. That court held that the purpose behind punitive damages in general "is a purely *public* one," explaining that "[t]he public's goal is to punish wrongdoing and thereby to protect itself from future misconduct . . . . The essential question therefore in every case must be whether the amount of damages awarded substantially serves the societal interest."[205] The court continued, "We cannot allow the *public* interest to be thwarted by a defendant's oversight or trial tactics."[206] The no-waiver rule, therefore, "require[s] meaningful judicial review before a defendant is subjected to punitive damages."[207]

In context, the *Simmons* and *Freund* no-waiver laws are, at the very least, rules "of form and mode"[208] that reflect important state public policies. The fact that the no-waiver laws function procedurally does not preclude them from being substantive for *Erie* purposes. Judge Posner made the following suggestion in a Seventh Circuit case about when to consider a "procedural" rule "substantive" for this category of *Erie* cases:

> [If a] state procedural rule, though undeniably "procedural" in the ordinary sense of the term, is limited to a particular substantive area . . . then the state's intention to influence substantive outcomes is manifest and would be defeated by allowing parties to shift their litigation into federal court unless the state's rule was applied there as well.[209]

The Supreme Court cited Posner's formulation favorably in *Gasperini* when concluding that the state standard of review at issue was substantive.[210] State no-waiver laws are likely to present exactly the sort of situation that Judge Posner described. The rationales of the courts and legislatures behind the state laws at issue in *Simmons* and *Freund* suggest that those laws are procedural mechanisms designed to safeguard specific and substantive state interests. As rules of form and

204. Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003).

205. Adams v. Murakami, 813 P.2d 1348, 1350 (Cal. 1991).

206. *Id.* at 1354–55 n.5.

207. *Freund*, 347 F.3d at 769 (Gould, J., dissenting in part).

208. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958).

209. S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995) (citations omitted).

210. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 (1996).

mode, they must then be weighed against the federal interests at stake.

The federal waiver requirement prevents one party from "sandbagging" the other by raising a new argument at the close of trial.[211] There are two reasons that the federal system might wish to prevent such occurrences. First, there is a fairness consideration. As suggested by the Ninth Circuit, a party's grounds for a procedural device as powerful as judgment as a matter of law should be raised at a time when the opposing party still has a chance to correct any deficiencies in its case.[212] Second, it would be a waste of judicial resources to force courts to reconsider decisions or jury verdicts by raising arguments at the literal last minute, after the conclusion of the trial. For example, assume a party has very strong grounds on which to make a 50(a) motion for judgment as a matter of law at the close of the opposing party's case. The party should be encouraged to raise the motion at that juncture in order to promote the efficiency of litigation and to avoid a costly new trial. But without a penalty for failing to raise the motion, parties might forget or deliberately wait until the close of trial to make a 50(b) motion, thereby unnecessarily prolonging the process.

Fairness and efficiency in the litigation process are certainly worthy federal goals, but in this context, they cannot trump the substantive state interests protected by state no-waiver laws. First, most litigants are likely to comply with Rule 50 by raising all their arguments in the proper 50(a) motion most of the time. The federal waiver precept remains in full force for any argument not protected under state law, so sandbagging is not likely to be a frequent occurrence. But even when it does occur, the trouble it causes does not seem to implicate an "essential characteristic" of the federal system in the way that the first and second clauses of the Seventh Amendment did in *Byrd* and *Gasperini*, respectively. Because sandbagging contains no constitutional component, and is not certain to occur each time a litigant uses Rule

211. *See supra* note 28 and accompanying text.

212. *See Freund*, 347 F.3d at 761. The Fifth Circuit described the same fairness rationale in greater detail:

> A reason for the rule . . . is to avoid making a trap of the [Rule 50(b) motion], either at the trial stage or on appeal. When a claimed deficiency in the evidence is called to the attention of the trial judge and of counsel before the jury has commenced deliberations, counsel still may do whatever can be done to mend his case. But if the court and counsel learn of such a claim for the first time after verdict, both are ambushed and nothing can be done except by way of a complete new trial. It is contrary to the spirit of our procedures to permit counsel to be sandbagged by such tactics or the trial court to be so put in error.

Quinn v. Sw. Wood Prods., Inc., 597 F.2d 1018, 1024–25 (5th Cir. 1979).

50, the interests behind the state no-waiver laws outweigh this particular federal interest.

The federal waiver requirement also prevents a party from forcing a judge "to 'engage in an impermissible reexamination of facts found by the jury'" as forbidden by the Seventh Amendment's Reexamination Clause.[213] This would occur where a party raises a new argument at the close of trial in a Rule 50(b) motion that presents a question of fact, already answered by the jury's verdict, and asks the judge to overturn that verdict. There is no doubt after *Byrd* and *Gasperini*—both of which implicated the Seventh Amendment—that this is a crucial federal interest. If it is an interest present in the conflict here, then it could dictate that federal waiver trump the contrary state law. The relevant question then becomes whether state no-waiver laws run afoul of the Seventh Amendment's Reexamination Clause.

This question involves an area of law that this Comment is not equipped to fully address. The authority of federal courts of appeals to (re)examine facts found in the lower courts has grown over the years, as evidenced by numerous cases, including the Supreme Court's decision in *Gasperini*.[214] However, it appears that a challenge to the sufficiency of the evidence, post-verdict, may run afoul of the Reexamination Clause.[215] The Ninth Circuit suggested as much in *Freund*, although in passing, when it noted that the state law frustrated both of the purposes behind Rule 50 waiver.[216] Although it might not be a problem in other contexts, the cases implicating sufficiency of the evidence in this context will always involve the argument being raised for the first time after the jury has already returned its verdict. The Supreme Court has explicitly held that appellate review of sufficiency of the evidence under these circumstances is unlawful because it involves an impermissible reexamination of the facts by the appellate court.[217]

The state no-waiver law in *Simmons* is a different matter. That law established municipal immunity as an absolute defense.[218] As such, it involved no fact found by the jury. It was a pure legal theory that

213. *Freund*, 347 F.3d at 761 (quoting Lifshitz v. Walter Drake & Sons, 806 F.2d 1426, 1428–29 (9th Cir. 1986)).

214. *See generally* Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129 (2001).

215. *See, e.g.*, Mallick v. Int'l Bhd. of Elec. Workers, 644 F.2d 228, 233 (3d Cir. 1981).

216. *Freund*, 347 F.3d at 761.

217. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657–60 (1935) (citing Slocum v. N.Y. Life Ins. Co., 228 U.S. 364 (1913) (clarifying *Slocum* and reiterating that judgment notwithstanding the verdict violates the Reexamination Clause if the argument is not reserved before the close of trial)).

218. Simmons v. City of Philadelphia, 947 F.2d 1042, 1085 (3d Cir. 1991).

would occasion no Seventh Amendment controversy.[219] This is undoubtedly why *Simmons*, which coincidentally addresses Reexamination Clause issues elsewhere, never reached a Seventh Amendment concern in its discussion of the no-waiver law for municipal immunity.[220] Because Pennsylvania's law does not violate the Reexamination Clause, it should remain valid and apply in diversity actions.

As long as a state no-waiver law does not protect an argument that a judge is forbidden from reviewing after the jury returns its verdict, *Byrd*'s balancing of state and federal interests weighs heavily in favor of the state laws. In the case of *Freund*, the no-waiver law appears invalid to the extent it violates the Seventh Amendment. For the state law in *Simmons* preventing waiver of municipal immunity, the state law should always trump Rule 50 waiver because it is a purely legal defense that raises no question of fact.

IV. IMPACT

A narrow construction of the Federal Rules would help to cut through the sort of analytical difficulties present in *Simmons* and *Freund* in future cases involving a variety of different state no-waiver laws. Indeed, construing the Rules with deference to other important constitutional principles, particularly federalism, finds support in Supreme Court precedent like *Gasperini*.[221] Perhaps the best part of the approach is that, if Congress or the Supreme Court is not pleased with the effects of this construction of Rule 50, there is an easy fix: the Supreme Court may incorporate a waiver requirement directly into the text of Rule 50. This would be a simple way of ensuring that direct collisions occur between state no-waiver laws and Rule 50, and—barring a major shift in Rules Enabling Act jurisprudence—Rule 50 waiver would prevail in each instance of conflict.

One might argue that the *Erie* framework advanced here is too cumbersome and gives too much deference to states seeking to override a sensible federal law. Courts are well-equipped to apply

219. In this sense, a purely legal defense like municipal immunity is similar to a punitive damage award, which "is not really a 'fact' 'tried' by the jury." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting). Justice Scalia was pointing out this uncontested fact about punitive damages to contrast them with compensatory damages and to argue that the majority was wrong to hold that compensatory damage review did not implicate the Seventh Amendment. Punitive damages as a question of law should not be confused here with the *sufficiency of the evidence of malice*, which was a prerequisite for an award of punitive damages in *Freund*.

220. *See Simmons*, 947 F.2d at 1085–86.

221. *See supra* note 160 and accompanying text.

Hanna's modified outcome-determinative test in most cases.[222] But this Comment has argued that the state laws must be read in context and balanced against the federal interests as well. This balancing approach might invite states to pass a proliferation of laws that would disrupt the operation of Rule 50 and require courts to examine the relevant interests on a case-by-case basis to determine whether the state law is valid. In practice, however, the balancing approach should be easily applicable and straightforward for a number of reasons.[223]

First, it should be easy for the balancing test to recognize those no-waiver laws that are substantive and those that are not. Proper no-waiver laws should be rooted in a specific, concrete public policy of the state, as demonstrated by the rationales behind the state laws in *Freund* and *Simmons*. As Judge Posner put it, the law must be "limited to a particular substantive area" in order to survive.[224] Consider the no-waiver law in *Freund* in particular. The sufficiency of the evidence of malice, required to obtain punitive damages, has a reasonable basis in the state's public policy and would pass muster (assuming it did not run afoul of the Seventh Amendment).[225] But a no-waiver law for every sufficiency of the evidence argument would not be valid and is not defensible on any reasonable policy ground. It is not limited to any particular substantive area like the California law, which is circumscribed to preserve the review of punitive damages only.

There is also no reason to think that states would behave irrationally by passing a flood of legislation granting immunity to arguments that do not directly relate to the substantive rights of their citizens. The rationales behind the federal waiver law—preventing sandbagging and post-verdict reexamination of the facts—are virtues that most states should recognize as well. If individual states want to promote fairness and efficiency in their own courts, they are not likely to pass a multitude of overly broad state no-waiver laws that have the potential to create nightmarish procedural problems at trial. Such broad no-waiver laws, whose protected interests are not immediately apparent or rooted in any public policy, would immediately fail the balancing test in a federal court.

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222. *See* Rowe, *supra* note 61, at 967 ("At the level of overall approach, *Erie-Hanna* doctrine seems to me . . . to have been increasingly definite and stable (as well as sensible and usually administrable).").

223. For an endorsement of another *Erie* balancing approach formulated differently from the one advocated here, see Doernberg, *supra* note 38, at 644–59.

224. S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995).

225. *See supra* notes 204–07 and accompanying text.

IV. CONCLUSION

This Comment has attempted to make a modest contribution to an area of law in which many people have advanced extensive and insightful legal arguments. Rule 50 and state no-waiver laws provide a narrow lens through which to examine just a few aspects of the Supreme Court's *Erie* doctrine. But this particular *Erie* conflict also has very real ramifications for states seeking to effectuate substantive policy goals in the federal courts. It is clear that states face an uphill, perhaps impossible battle when they pass laws that directly collide with a Federal Rule of Civil Procedure. The two circuits that have addressed this issue, however, should recognize that a direct conflict between the state laws and Rule 50 is not inevitable. A narrow reading of Rule 50 suggests that its waiver requirement is a separate, decisional law employed by the courts to give the Federal Rule teeth. Once the conflict is avoided, there is no need to wade into the larger and more volatile debate over the Supreme Court's interpretation of the Rules Enabling Act, under which most state laws will perish in the face of broad federal rule-making authority. Instead, state no-waiver laws should be tested against *Hanna*'s modified outcome-determinative test. Once they pass, they must also be weighed against the federal interests at stake. When no-waiver laws exist as the mechanism for protecting substantive rights enshrined in concrete public policies of the states, they should outweigh any countervailing federal interest and remain intact.

*Austin Stephenson**

* J.D. Candidate 2011, DePaul University College of Law; B.A. 2006, University of Chicago. Thanks to Professor Mark Moller and to Robert Tannenbaum for their extremely helpful notes on earlier drafts of this Comment and for their steadfast encouragement.